



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT CHUKA

HCCR NO. 3 OF 2016

REPUBLIC.....PROSECUTOR

VERSUS

MORRIS MURIMI MUREITHI.....ACCUSED

J U D G M E N T

1. MORRIS MURIMI MUREITHI (*"the Accused"*) is charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code, Cap 63 of the Laws of Kenya. It is alleged that on the 9th March, 2016 at Gathoge village, Kamwimbi sub-location within Tharaka-Nithi County jointly with others not before court, the Accused unlawfully murdered Carrison Comba Mutegi (*"the deceased"*). The Accused pleaded not guilty and the prosecution lined up seven (7) witnesses to prove the information.

2. PW1 was Dr. Justus Kitili from the Chuka District Hospital. He recalled how on 18th March, 2016 he carried out a postmortem on the body of the deceased at the Chuka District Hospital Mortuary. The body had multiple injuries including burns on various parts. He formed the opinion that the cause of death was cardio-pulmonary attack due to severe head injury and severe burns. He produced a Post Mortem Report dated 18th March, 2016 as P Exh 1. In cross-examination, he confirmed that the body had 100% burns.

3. Joyce Karimi (PW2) was the wife of the deceased. She told the court that on the 9th March, 2013 at about 9.00 am, she was with the deceased at their home when he was suddenly attacked by Lewis Murimi, Dancan Mugendi, Murugi Mugendi, Njeru Gitonga and a Mukundi with a knife, panga, stone, arrows and hammer. That the Accused stabbed the deceased with a knife at the back of his head and left side of the abdomen whereby the deceased fell down and died. They then tried him, removed his body to a public road and set it on fire. In cross-examination, PW2 told the court that Dancan Mugendi had two cases in court against the deceased for the eviction of the latter from the land the deceased was living in. She denied that the Accused and his mother live in Nairobi. She insisted that the deceased died at home and was not killed by a mob at Gathoge Market. That after the incident, all the rest disappeared except the Accused.

4. Jane Wanja (PW3) recalled that on the material date she was at the deceased's compound when at about 9.00 am, the Accused in the company of four (4) others attacked the deceased and killed him. She was a sister to the deceased and an auntie to the Accused. In cross-examination, she denied seeing Njeru Gitonga at the scene at the material time. She also denied that the Accused was in Nairobi at the material time. Veronica Ciambuba (PW4) was the mother of the deceased. She recalled that she used to live in the same compound with the deceased. On the material day, she went to the farm at 7.30 am only to receive a call from PW3 about the unfortunate incident. When she went back home, she found the deceased's body burning by the roadside. The body was tied and its private parts had been removed. She saw the Accused,

Mugendi Njeru and Murugi at the scene. In cross-examination, she denied that the deceased was burned by a mob. That she never saw any other people at the scene as indicated in her statement to the police. She also denied that the Accused was in Nairobi at the material time.

5. No.63143 P.C Joseph Cheboi (PW5) recalled how in the morning of 10th March 2016 at about 4.30 am, he accompanied other police officers to Gathoge village to effect arrests. At Gathoge village, they arrested the Accused and his grandmother. The grandmother was later released. He learnt from the Accused that the Accused used to work as a tout in Nairobi. He also learnt that the family of the deceased had a land dispute. No.33839 I.P. Martin Wanga (PW6) investigated the case. The case was minuted to him on 10th March, 2016. He learnt that a report of murder had been made to Chuka Police Station the previous day. He interrogated PW2, PW3 and PW4 and took their statements. In his investigations, he established that on the 9th March, 2016, PW2 and PW3 were at the house of the deceased when the deceased was attacked by amongst others, the Accused. That PW2 and PW3 run away whereby PW2 called and informed PW4 about the incident. On her way home to find out what was happening, PW4 found that the deceased had been burnt by a mob. The body was removed to Chuka District Hospital Mortuary. On 11th March, 2016 the Accused and his grandmother were arrested. In cross-examination, he told the court that the Accused had denied being at the scene when the incident took place. The Accused's mother likewise told him that the Accused was not present at the time of the incident. That the report that was made to the police was that the deceased had been beaten by members of the public. He found out from the O.C.S Chuka that the deceased was a habitual criminal who had been arrested severally. He tried to get independent witnesses for the case but no-one volunteered.

6. No.232029 CIP Juma Wawire (PW7) told the court that PW4 made the report of murder at Chuka Police Station on 9th March, 2016 at about 14.30 hrs. She reported that her son, the deceased, had been killed by her two other sons whom she named as Duncan Mugendi and Peterson Kinyua. In cross-examination, he told the court that when he rushed to the scene he gathered from those present that the deceased had been killed by a mob estimated to be of 30 people. That the body had no mutilation and that the deceased was a habitual criminal.

7. In his defence, the Accused gave an Alibi. He told the court that at the material time, was a turn boy of garbage collection lorries in Nairobi where he lived. That on the material day, he and his mother, Calvin Muthoni (DW2) left Nairobi at about 11.00 am for Gathoge village. They reached Gathoge market at about 3 pm when he learnt that his uncle, the deceased, had been burnt at the market. He denied being among those who killed the deceased. In cross-examination, he told the court that he used to live in Mukuru Kwa Reuben in Nairobi and was a turn boy in a lorry belonging to Lujusa Gabbage Collectors along Kijabe Street. That he had been working with the said company since 2014. He said that he had been framed because of a long standing land dispute within the family.

8. Calvin Muthoni (DW2), the mother to the Accused, told the court that she lives in Nairobi with all her children ever since she separated with her husband. That on the material day, she and the Accused were travelling from Nairobi to Gathoge village to construct a house for the Accused. That they left Nairobi at about 11.00 am and reached Gathoge market at about 3.30 pm when she learnt that a mob had burnt her cousin, the deceased. She denied that the Accused was at the scene when the incident occurred. In Cross-examination, she explained that there had been a long standing land dispute between the deceased and Njeru Gitonga. That she learnt that on the material date, the deceased was chasing Njiru with arrows when he was murdered. That she learnt of the Accused's arrest after she had returned to Nairobi whereby she returned to Gathoge to find out what was happening to her son.

9. This court has carefully considered the evidence in its totality. The offence of murder is committed when a person with malice aforethought causes the death of another by an unlawful act or omission. It therefore behoves the prosecution to prove the death of a deceased and the cause thereof. It must also prove that the death was caused by the unlawful act of the person charged and that such a person was of malice aforethought.

10. On the first issue, the testimonies of PW2, PW3 and PW1 were that the deceased was on 9th March, 2016 attacked while in his compound, stabbed with a knife, cut with a panga and his body set on fire. The

postmortem conducted on his body on 18th March, 2016 revealed, inter alia, a deep cut on the right parietal skull, a deep cut on the right axilla and subdural haematoma on the right parietal lobe of the brain. The cause of death was given as being cardio pulmonary attack due to severe head injury and severe burns. The prosecution therefore did prove the death of the deceased and the cause thereof.

11. Was the death of the deceased caused by the Accused? PW2 and PW3 were categorical that on the material date, the deceased was attacked by five (5) people. They named the attackers as Lewis Murimi, Duncan Mugendi, Murimi Mureithi, Murugi Mugendi, Njeru Gitonga alias Kathegece and Mukundi Kamunyo. They identified the Accused as the one who stabbed the deceased with a knife and poured fuel over the body of the deceased. They denied the suggestion of the defence Counsel that the deceased was attacked and killed by a mob. The Accused's defence was an alibi. That on the material date and time of the incident, he was in Nairobi and arrived in Gathoge village long after the murder of the deceased. He called his mother to support his version of the story.

12. PW4 was the mother of the deceased. She was the one who made the first report at the Chuka Police Station. She never witnessed the incident. According to PW7, the report made by PW4 on the day of incident at 2.30 pm in OB No.25/9/3/2016 was that the deceased had been murdered by two of her sons. She gave their names as Duncan Mugendi and Peterson Kinyua. When PW7 visited the scene to recover the body, he gathered information to the effect that the deceased had been killed by a mob. A village elder at the scene gave him that information. PW6 who investigated the case told the court that he charged the Accused on the basis of the statements made by PW2, PW3 and PW4. That he charged him notwithstanding the report made to the effect that the deceased had been killed by a mob. He confirmed that he was unable to get any independent witness outside the family of the deceased.

13. This court saw the witnesses testify. It came out clear from PW2 and PW4 the wife and mother of the deceased respectively, as well as DW2 a step sister to the deceased that there was deep rooted family differences within the family touching on the land of the father of the deceased and the inheritance thereof. The brothers of the deceased were opposed to him inheriting the land left behind by their father on the basis that he was not their own biological brother. That when PW4 was married to the family, she came with the deceased. Indeed the report PW4 gave to the police is that the deceased had been killed by her own sons. It came out clearly at the trial that Duncan Mugendi, a son to PW4 was the ring leader. According to DW2, the father of the deceased was married to two wives, PW4 and Ausilia Ciandeke (the grandmother to the Accused). He had given two acres of land to Ausilia Ciandeke while he gave the family of PW4 a separate land. Since Ausilia Ciandeke had only one child DW2, her land would definitely not be the subject of dispute as the husband had clearly distributed it to his respective houses. The Accused was not connected to the simmering land dispute. He was not connected directly with the nuclear family of PW4. He could not stake his claim on the land given to the house of PW4 by his grandfather but that given to Ausilia Ciandeke from whose house he was arrested. Obviously therefore no motive was proved on the part of the Accused.

14. It did not escape this court attention that PW4 first made a report of mob justice to the police; that a village elder who the police found at the scene told the police about the mob justice theory. Further, while PW2 and PW3 insisted that the deceased died at home, PW1 told the court that there was soot in the lungs of the deceased showing that he was alive at the time he was being burnt at Gathoge market.

15. The other issue is the alibi given by the accused. In the case of Uganda .v. Sebyala [1969] EA 204 at 208, the court held:-

"I must also bear in mind, as was pointed out in Tanzania Criminal Appeal 12D 68 in February this year by GEORGES CJ:-

The accused does not have to establish that his alibi is reasonably true. All he has to do is to create doubt as to the strength of the case for the prosecution. When the prosecution case is thin an alibi which is not particularly strong may very well raise doubts.

..... "

16. PW6, who investigated the case admitted that the Accused and DW2 had informed him before charging the Accused that he was not present at the scene. PW6 did not investigate the alibi to discredit it and prove the prosecution's case beyond any reasonable doubt. He had the opportunity to do so but chose not to. The prosecution also failed to take advantage of section 309 of the Criminal Procedure Code and rebut the defence of alibi. The Accused was firm in his testimony that he was in Nairobi at the time of the incident. He gave the address he lives in and the place of his work. The prosecution did not seek to displace the same. This coupled with the fact that of all those who allegedly participated in the killing of the deceased, it is the Accused who was found in the house of his grandmother the day following the murder, gives credence to his alibi defence. How else can it be explained that the Accused was still around the home while all the rest had disappeared. That conduct is inconsistent with his guilt but consistent with innocence. This court believes that he was framed with the charge for reason of family rivalry.

17. In the circumstances, I find that the prosecution has failed to prove its case beyond any reasonable doubt against the Accused. The Accused is therefore acquitted of the offence of murder.

DATED and Delivered this 20th day of December, 2016.

A. MABEYA

JUDGE